POLICY NOTE

THE FORENSIC MEDICAL SERVICES (SELF-REFERRAL EVIDENCE RETENTION PERIOD) (SCOTLAND) REGULATIONS 2022

SSI 2022/XXX

The above instrument is made in exercise of the powers conferred by section 8(1)(b) of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 ("the FMS Act"). This instrument is subject to affirmative procedure.

Purpose of the instrument.

These regulations set the length of time that evidence, such as biological samples, collected during a self-referral Forensic Medical Examination (FME) and stored by health boards, will be retained. This is referred to as the "retention period". After the retention period has expired, health boards must destroy the evidence.

Policy Objectives

The FMS Act places a statutory duty on all territorial health boards in Scotland to provide forensic medical services for those who may have been raped or sexually assaulted and enshrines the principles of trauma informed care. The Act will establish a legal framework for consistent access to appropriate support and healthcare services as well as a FME to collect any potential evidence, at a time when a person may not feel ready to report to the police. This is known as "self-referral" and will be available to those who are 16 and over, subject to professional judgement.

The regulations set a retention period of 26 months (two years and two months). This aims to strike the right balance between ensuring that evidence is held for a reasonable timescale, should an individual decide to report to the police, and the practical considerations for health boards if required to retain evidence for lengthy periods of time. The human rights implications of forensic data storage have also been taken into account in setting a proportionate time frame. Consideration can be given to amending the retention period in the future based on emerging evidence.
The retention period is the same for all of Scotland and is calculated from the day that evidence is collected. In circumstances where a FME begins on one day, but is not concluded that day, the day that the FME was started is the relevant date for the purpose of calculating the retention period. This approach will ensure consistency of service, regardless of which health board provides someone with support. People who access these services will be clear about how long evidence will be retained for and health boards will be clear about what is expected of them.

There are circumstances where the 26 month retention period does not apply. These are set out below:

- the person who underwent the self-referral FME requests that their evidence is destroyed (under section 8(1)(a) of the FMS Act). A 30 day cooling off period applies and health boards must ensure that evidence is only destroyed either once 30 days have elapsed from the date of that request or from the retention period date if that expires before the end of the cooling off period.

- the person who underwent the self-referral FME reports the related incident to the police, who request that the evidence is passed to them (as allowed for in section 9 of the FMS Act).

Consultation

A public consultation[1], held between 5 February and 30 April 2021, gathered views on the recommendation that the retention period for evidence collected during the course of a self-referral FME should be 26 months.

A retention period of 26 months had been recommended to Scottish Ministers by the CMO Taskforce for Rape and Sexual Assault (made up of key health, justice and third sector partners) based on a range of evidence and practice:

- Those who decide to report to the police usually do so between three and six months after they have been raped or sexually assaulted;
- The retention period in England, Wales and Northern Ireland is under two years;
- The Scottish Government wants to make sure people have enough time to make a decision whether to tell the police or not;
- The Scottish Government suggested a further two months to avoid the risk of distressing or re-traumatising people, if the retention period falls on the anniversary of their assault.

Just over half of those who responded (32 out of 63 responses) agreed that the retention period should be 26 months. For those that did not, there was no consensus both in terms of whether the retention period should be longer or shorter, or what a longer or shorter period should be. 33 organisations responded: this included health boards, victim support organisations, justice organisations, educational organisations and organisations representing specific groups of people.

The Scottish Government has produced an analysis report[2] and where permission was given consultation responses[3] have been published.

Impact Assessments

The following impact assessments have been published:

- Children's Rights and Wellbeing Impact Assessment[4]
- Island Communities Impact Assessment[5]
- Equalities Impact Assessment[6]

A screening process was carried out which determined there was no further update required to the following impact assessments which were previously carried out to accompany the introduction of the FMS Bill:

---

[1] https://consult.gov.scot/equally-safe/equally-safe-retention-period-of-samples/
[2] https://www.gov.scot/publications/analysis-responses-equally-safe/
[3] https://consult.gov.scot/equally-safe/equally-safe-retention-period-of-samples/consultation/published_select_respondent
[4] https://www.gov.scot/isbn/9781802019278
[5] https://www.gov.scot/isbn/9781802019261
[6] https://www.gov.scot/isbn/9781802019254

- Data Protection Impact Assessment (DPIA)[7]. A revised DPIA was published in November 2020.
- Fairer Scotland Duty Assessment (FSDA)[8]

No Strategic Environmental Assessment (SEA) has been undertaken as there are no environmental impacts.

Financial Effects

The Cabinet Secretary for Health and Social Care has confirmed that a Business and Regulatory Impact Assessment is not required for these regulations. There are no direct costs placed on health boards, third sector or other relevant organisations. Any costs incurred by health boards, (for instance to provide equipment for the storage and retention of evidence obtained from a self-referral FME), is being met by the Scottish Government.

Scottish Government
CMO Rape and Sexual Assault Taskforce Unit

24 January 2022

[7] https://www.gov.scot/publications/forensic-medical-services-victims-sexual-offences-scotland-bill-dpia/
[8] https://www.gov.scot/publications/forensic-medical-services-victims-sexual-offences-scotland-bill-fsda/